

As regards the first point, in view of the grounds of appeal contained in the letter of the appellant addressed to the Minister of Home Affairs, there was in effect sufficient compliance with the law and since the Minister already had the grounds of appeal with him there was no necessity for the appellant to be present before the Minister.

As regards the second point it would not be out of place here to refer to the view in De Smith's *Judicial Review of Administrative Action* (4th Ed) at p 277:

What would be the position in English administrative law if a Minister were to be called upon to decide whether or not to confirm an order made by a local authority affecting his own property? He could not lawfully transfer to another Minister his duty to decide. He might depute one of his own officials to make the decision; the decision would nevertheless be made in the Minister's name. It is submitted that the validity of the decision could not be challenged merely on the ground that the Minister was in a sense judge in his own cause; for the legal duty to decide the class of matter to which this belonged had been cast upon him, and upon him alone. (Cf *Auten v Rayner* [1958] 1 WLR 1300). If it were possible to show that the Minister had in fact failed to consider the merits of the order for reasons of personal interest, his decision could be successfully challenged.

Thus apart from the doctrine of necessity, we have to bear in mind that in this case a court of law had already declared UMNO to be an unlawful society and in deciding the appeal there was in fact no other option open to the Minister except to confirm the decision of the Registrar to cancel the registration of the society in compliance with the declaration of the court.

We accordingly dismissed the appeal with costs. In deference to the submission by Mr Yeoh that his client was not a man of means and that the decision of the court according to him could well pave a way for unity we allowed the deposit to be paid to the respondents as costs.

Appeal dismissed.

Yeoh Poh San & Co.

Reported by *Prof Ahmad Ibrahim*

A Morgan Guaranty Trust Company of New York v Lian Seng Properties Sdn Bhd

HIGH COURT (KUALA LUMPUR) - COMPANIES
(WINDING-UP) NO D1-42-577-1987

B VC GEORGE J
23 JUNE 1989

Companies and Corporations - Winding-up - Supporting creditor - Whether has locus standi - Default judgment - Whether irregular or a nullity - Whether can be attacked in collateral proceedings - Application of bankruptcy rules in winding-up proceedings - Whether judgment obtained after commencement of winding-up is provable in liquidation - Lump sum agreement - When payment crystallizes - Counterclaim - Whether winding-up petition should be stayed or dismissed - Stay of execution - Stay of winding up

A winding-up petition was presented against Lian Seng Properties Sdn Bhd ('Lian Seng') by the petitioner on 10 December 1987. When the petition came up for hearing the petitioner informed the court that it has no further interest in the petition. Two supporting creditors then applied for substitution but before the application for substitution was heard, Lian Seng applied to strike off Pembinaan KSY Sdn Bhd ('KSY') as supporting creditor.

At the outset of the proceedings for striking off, KSY argued that the application to strike off was premature and that it should only be determined after substitution. KSY initially relied on the two judgments it had obtained against Lian Seng. Lian Seng challenged both the judgments. The first judgment was attacked as being a nullity and that the judgment could be impugned in collateral proceedings in which it is being relied. It was contended that by O 3 r 5(3) of the Rules of the High Court 1980 when time is computed it must exclude the weekly holidays. But KSY contended that computation ought to be by the Interpretation Act, and not by the Rules of the High Court. The second judgment was an O 14 judgment and Lian Seng contended that it was not provable in liquidation as it was obtained after the commencement of winding up. When KSY sought to rely on the lump sum agreement it was contended that the payment under the agreement was not due before the date of commencement of winding up and accordingly did not enable KSY to qualify to be a substitute petitioner. It was also argued that a genuine counterclaim is a bar to the proceeding in winding up by KSY.

Held, allowing the application to strike off KSY as a supporting creditor:

H (1) The status of the applicant for substitution ought to be determined at the outset of the application for substitution as a petitioner.

(2) The computation of time for court proceedings is governed by the Rules of the High Court and not the general provisions of the Interpretation Act.

I (3) The judgment entered independently of any of the Rules of the High Court ought to be regarded as a nullity.

(4) A judgment which is a nullity can be ignored or be attacked in collateral proceedings where it is sought to be relied upon.

(5) KSY has no locus standi as the right to support the petition is founded on a judgment which is a nullity.

(6) The second judgment obtained in a contested O 14 application does not give the petitioner the right to support the petition as it was obtained after the commencement of winding-up.

(7) KSY's right to rank as a creditor by virtue of the lump sum agreement cannot be considered here as the crystallization of the debt was well after the date of presentation of the winding-up petition.

(8) Lian Seng is entitled to make a cross-claim as the lump sum agreement only excluded a counterclaim or a set-off in proceedings filed by KSY.

(9) Section 41 of the Bankruptcy Act applies to winding up and as there is a right of set-off, KSY's debt is only the remainder of the set-off pleaded by way of Lian Seng's cross-claim.

(10) Lian Seng's cross-claim is a genuine and substantial one and accordingly KSY cannot be recognized in this petition as a supporting creditor.

Cases referred to

- 1 *Anlaby & Ors v Praetorius* (1888) 20 QBD 764 (folld)
- 2 *Syarikat Joo Seng & Anor v Habib Bank Bhd* [1986] 2 MLJ 129 (folld)
- 3 *Harkness v Bells Asbestos & Engineering Ltd* [1967] 2 QB 729 (folld)
- 4 *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 (folld)
- 5 *Ex parte Bonham, In re Tollemache* (1885) 14 QBD 605 (folld)
- 6 *Re Malay National Banking Corporation Limited* [1957] MLJ 33 (folld)
- 7 *In re LHF Wool Ltd* [1970] 1 Ch 27 (folld)
- 8 *In re Portman Provincial Cinemas Ltd* (1964) 108 Sol J 581 (folld)
- 9 *Datuk TP Murugasu v Wong Hung Nung* [1988] 1 MLJ 291 (folld)
- 10 *Re Mittagong RSL Club Ltd* 4 ACLR 897 (folld)
- 11 *The Fedora* [1986] 2 Lloyd's Rep 441 (distd)

Legislation referred to

Bankruptcy Act 1967 s 41
Rules of the High Court 1980 O 3 r 5(3), O 14
Interpretation Act 1981

Rosli Dahlan for the petitioner.
MS Murthi for the respondent.
PS Gill for the supporting creditor.
Lorraine Cheah for Corporate Express (M) Sdn Bhd.
Shanty Thuraisinghan for Utama Wardley Berhad.
SM Choong for Mdm Tan Lee Choo and Jagur Sdn Bhd.

Cur Adv Vult

VC George J: Lian Seng Properties Sdn Bhd ('Lian Seng'), the registered proprietors of certain land in Jalan Bukit Bintang, Kuala Lumpur, had decided to develop it by constructing a multi-storey complex on it to be known as KL Plaza. The contractors engaged for the construction was Pembinaan KSY Sdn Bhd ('KSY'). In embarking on this development exercise Lian Seng had made substantial borrowings from various financial institutions including the American International Assurance Company, the repayment of whose loan of \$30m and interest was guaranteed by Morgan Guaranty Trust Company of

A New York ('Morgan') pursuant to which guarantee Morgan had made a demand on Lian Seng for \$33,323,593.91 which demand not being met Morgan caused the instant petition to wind up Lian Seng to be presented on 10 December 1987. The petition was supported, inter alia, by KSY who claimed to be a creditor of Lian Seng. When the petition eventually came on for hearing Morgan informed the court that it had assigned its rights in the contract of guarantee to one Corporate Express (M) Sdn Bhd and had no further interest in the petition. Corporate Express formally applied by encl (71) to be substituted as petitioner. KSY also applied by an oral application made by counsel to be substituted as petitioner. Before these applications for substitution could be considered Lian Seng moved the court by encl (72) to have KSY struck off as a supporting creditor. It was submitted that it had no locus standi to support the petition. Encik PS Gill of counsel for KSY took a preliminary objection in respect of the motion encl (72) submitting that the issue of whether KSY was a creditor was something to be gone into after the substitution had been made.

KSY's entitlement to be substituted in place of the petitioner depends on its right to present a petition. Rule 33 of the Companies (Winding Up) Rules 1972 provides that the substitute petitioner would have to be a person (which term includes a corporation) who 'would have a right to present the petition and who is desirous of proceeding with the petition'. KSY's claim to the right is as a creditor entitled to support the petition. If it is not entitled to do so it cannot be substituted as petitioner. Accordingly the challenge to its locus standi is an issue that can and has to be disposed of before the decision is made as to who if anybody should be substituted in place of the withdrawing petitioner. The objection was overruled.

KSY had initially purported to found the right to be a supporting creditor on two judgments which they have obtained against Lian Seng. Peter Kuah Tian Nam, the managing director of KSY, in para 1(c) of his affidavit encl (68) refers to the two judgments - an O 14 judgment obtained on 17 November 1988 for \$12,902,000 and a judgment in default of statement of defence entered on 31 March 1987 for \$10,529,000.

Encik MS Murthi of counsel for Lian Seng contends that the default judgment of 31 March 1987 is invalid. What had happened was that the solicitors for KSY, having served the writ seeking judgment for a liquidated amount of \$10,529,000 said to be the outstanding amounts on architects' certificates and for general damages interest and costs, had by their letter of 20 March 1987 given the defendant an extension of seven days from 23 March 1989 to file and deliver the defence. What was filed and delivered was a defence and counterclaim and set-off which was filed and delivered on 2 April 1987. In the meantime

on 31 March 1987 the plaintiff's solicitors entered the said default judgment. Encik Murthi's contention is that in effect by that letter of 20 March 1987 the defendants were given until April 1987 to deliver the defence and that accordingly there was no question of default of defence as on 31 March 1987 and it follows, he contends, that the judgment ought to be set aside and it is further contended that whether it is set aside or not it is ipso facto invalid and that a right to be a supporting creditor in a winding-up petition cannot be founded on such a judgment.

I pause to note that an application to set aside the said default judgment was filed, a copy of which application is exhibited as MSM-3 to encl (78) but it was not proceeded with apparently because of an agreement entered into between the parties on 22 April 1987 (encl (68) exh PK-1) whereby, inter alia it was apparently agreed that all proceedings between the parties should be stayed. Now a statement of defence has to be filed within the period prescribed by O 18 r 2. But there can be an extension of that period. Order 3 r 5(3) provides as follows:

(3) The period within which a person is required by these rules, or by any order or discretion, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the court being made for that purpose.

And O 3 r 2 deals with the reckoning of time fixed by the rules and sub-rule (5) to O 3 r 2 provides as follows:

(5) Where, apart from this paragraph, the period in question, being a period of 7 days or less, would include the day before the weekly holiday, the weekly holiday or public holiday, that day shall be excluded.

Encik PS Gill submitted that the reckoning of time has to be done on the basis provided by the Interpretation Act. However, as was pointed out by Encik Murthi, s 2(3) of the Interpretation Act does provide that the Act applies only if no other provisions are available. The extension of time given by the plaintiff's solicitors was pursuant to the power to do so given by O 3 r 5(3) and accordingly the specific provision for reckoning of time given in the RHC will apply in preference to the general rules of reckoning given in the Interpretation Act. Accordingly O 3 r 2(5) applies.

Now, 23 March 1987 was a Monday. Accordingly there was a Saturday and a Sunday within the seven days' extension granted by the plaintiff's solicitors which two days have, by virtue of O 5 r 2(5), to be excluded from the reckoning which has the result that the seven days end on 2 April 1987 which in turn means that the defendants had until 2 April 1987 (inclusive of that date) to file the defence. The defence, as has been seen, was filed on 2 April 1987. Whether it was so filed or not, on 31 March 1987 the defendants cannot have been and were not in default of defence. Accordingly the said default judgment entered on 31 March 1987 was irregularly entered independent of

A the RHC and should be set aside ex debito justitiae. I pause to note the terms of O 2 r 1(1):

1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

However O 2 r 1 has no relevance where the irregular entry of judgment was made, as was done here, independent of any of the rules - see *Anlaby & Ors v Praetorius*¹ followed and applied by the Supreme Court in *Syarikat Joo Seng & Anor v Habib Bank Bhd*² at p 131F. The judgment of 31 March 1987 has to be regarded as a nullity. Where an order is a nullity the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside - *Harkness v Bells Asbestos & Engineering Ltd*.³ Such an order may be attacked in collateral proceedings - per Abdooldader J (as he then was) speaking for the Federal Court in *Eu Finance Bhd v Lim Yoke Foo*.⁴ Accordingly the attack on that default judgment in these collateral proceedings may be entertained even though the judgment has not been set aside. The right to support the petition as a creditor cannot be founded on such a default judgment. On the basis of that judgment KSY has no locus standi in this petition and cannot and will not be accepted as a substitute petitioner.

F The other judgment relied on by KSY was the one for \$12,902,000 obtained in an O 14 application on 17 November 1988. As has been seen the instant petition was presented on 10 December 1987 on which date the said judgment had not come into existence. *The Law of Company Liquidation* by McPherson (3rd Ed) says, at p 41, in dealing with a creditor's application for a winding-up order: 'The applicant must, however, be one to whom the company owes a valid debt which has not been paid at the date of filing of the application for a winding-up order ...'. At p 45 the learned author concludes that a creditor in the context includes every person who has the right to prove in winding up.

I Section 291 of the Companies Act provides that the laws applying to bankruptcy will apply in respect of proof of debts in a winding up of a company. Section 47 of the Bankruptcy Act provides that the bankruptcy, whenever it may be eventually pronounced, shall be deemed to have relation back to and commence at the time of the act of bankruptcy being committed on which the receiving order is made. Section 219(2) of the Companies Act is a similar relation-back provision in respect of winding up, the winding up to be deemed (in all cases other than a voluntary winding up) to have commenced at the time of the

presentation of the winding up. Applying similar provisions the Master of the Rolls in *Ex parte Bonham, In re Tollemache*⁵ said:

I am prepared to lay this down, that when the only evidence of a debt is a judgment, and the judgment has been recovered after the act of bankruptcy, the judgment debt cannot be proved in the bankruptcy.

This principle was applied by Spenser Wilkinson J in *Re Malay National Banking Corporation Limited*⁶ where after having cited the above passage from the Master of the Roll's judgment the learned judge went on to hold at p 34 as follows:

This decision is, in my opinion, applicable to the law of bankruptcy in force in the Federation. In this case the only evidence before the Official Receiver of the debt in respect of which the proof was lodged was the judgment of the court in Civil Suit No 279 of 1952. This judgment was obtained after the petition to wind up the Malay National Banking Corporation Limited was presented, and if it is material the judgment in default was obtained by Mohamed Store, subsequent to the date of the presentation of the petition with the knowledge of Mohamed Store that a petition had been presented. In these circumstances I am doubtful whether any part of the proof of Mohamed Store in the winding up should have been allowed.

Applying that somewhat startling principle I have to hold that the amounts ordered to be paid pursuant to the said judgment of 12 November 1988 is not a debt provable in the winding up per se the judgment and that accordingly the basis for seeking recognition as a supporting creditor by KSY relying on the judgment of 17 November 1988 is not a sound basis.

Encik PS Gill did not directly deal with the principle in *Ex parte Bonham, In re Tollemache*⁵ but in effect appeared to concede the argument by taking the stand (or in any event taking the alternative stand) that KSY did not have to rely on either of the two judgments as in his submission KSY's right to be a creditor crystallized on 15 September 1987 when KSY completed the KL Plaza Complex or at the latest on 1 November 1987 which was the date of the certificate of practical completion, both of which dates were prior to the presentation of the petition on 10 December 1987.

The parties had entered into what is described as the lump sum written agreement, exh PK-1 to Peter Kuah's affidavit encl (68) on 22 April 1987. Inter alia, it provides that the project, ie the erection and completion of the KL Plaza Complex, shall be deemed to be completed upon the consultant architect issuing a certificate of practical completion. Such a certificate was issued on 1 November 1987 certifying that the job had been completed on 15 September 1987. Encik Gill's submission was that on such completion the parties had agreed that \$26,050,000 with interest would be payable to KSY. It was contended that KSY was entitled to be a supporting creditor in that it was a

A creditor of Lian Seng as at the date of presentation of the petition by virtue, as Encik PS Gill put it, of an 'executed and completed contract in accordance with the lump sum agreement exh PK-1 to encl (68)'.

However, cl 5(c) of the lump sum agreement provides that the agreed lump sum has to be paid within a period of 18 months from date of completion which date for payment would be well after the date of the presentation of the petition. It was contended that because certain monthly payments of interest had not been made and in any event because of the presentation of the petition to wind up, KSY was entitled not to wait for the 18 months to expire. C Reliance was placed on sub-cl (b) of cl 3 which should be looked at:

3 In consideration of the premises contained herein and the due performance of the company of all its obligations the contractor hereby undertakes as follows:

D (a) to complete the said project in accordance with the contract within a period of four months from date of receipt of the first \$1m from the bridging financiers;

(b) to suspend all legal action against the company from date hereof until 'the due date' mentioned in para 5(c) below provided that if the company should breach any part of this agreement or applications are made by any persons or corporations for the winding up of the company or the appointment of receivers, the contractor shall be relieved of its forbearance to sue and the contractor shall be at liberty to take such legal action as the contractor deems fit.

The actual terms of the said cl 5(c) are as follows:

F 5(c) the company further undertakes to pay the lump sum amount referred to in para 5(a) above, within a period of 18 months from the date of completion of the said project (hereinafter referred to as the due date) or upon the occurrence of any sale as in para 5(d) contained herein whichever shall be the earlier.

In my judgment the forbearance to sue in cl 3(b) does not have the effect of doing away with or shortening the 18-month period even if there are breaches or even if there has been a presentation of a winding-up petition. If that had been the intention, a specific proviso to that effect would have been included in the agreement either attached to cl 5 or elsewhere. What the parties had agreed in this context was that (i) \$26,050,000 was payable and (ii) it was payable within 18 months. The question of forbearance to sue would only arise once the right to sue had been vested. By the terms of the agreement such vesting was not to take place until the 18 months had passed. The crystallization that KSY relies on would only come about when the agreed 18-month period was completed which was well after the date of the presentation of the petition. Such forbearance to sue that there was is in respect of the right to sue that had crystallized or had vested prior to the parties entering into the lump sum agreement.

Another question was the issue of whether it was open to Lian Seng to make a cross-claim against KSY and if it

was, the effect of it on KSY's right to petition for a winding up order. Encik Murthi concedes that by the terms of cl 8 of the agreement of 22 April 1987 Lian Seng is precluded from setting up as a defence any set-off or counterclaim. However, he argues that that does not preclude Lian Seng from filing a cross-claim which while it would not provide a defence to KSY's action is relevant on the issue of KSY's entitlement to wind up Lian Seng.

As has been seen, the provisions in respect of bankruptcies apply in respect of proof of debt and s 41 of the Bankruptcy Act provides that where there are mutual credits, mutual debts or mutual dealings between the debtor and the person proving, an account shall be taken of what is due from the one party to the other and there would be a setting off and what can be proved as a debt will be the balance, if any, after such setting off.

For Lian Seng it is said that they are entitled to a cross-claim for defective works even though the defects liability period had passed. The authoritative text book *Hudson's Building and Engineering Contracts* (10th Ed) provides at p 396 the following view:

In the eight and ninth editions of this book it was submitted that, where the contract does not provide to the contrary, although the building owner cannot insist upon the contractor making good defects which may appear after the period expires, there is nothing to prevent him bringing an action for damages in respect of defects which arise from breaches of contract by the contractor, and this view has now received the support of modern authority. It is always a question of construction whether the rights under the maintenance clause are intended to supplant the right to damages at common law altogether. In the absence of express provisions the remedies under these clauses are in addition to and not in substitution for the common law rights, and even where the defects have appeared within the period the employer may sue for damages rather than call on the contractor to do the work, subject, in that event, to the employer's damages being limited, for the reasons stated supra, to the cost to the contractor of doing the work at that time, rather than the possibly greater cost of bringing in another contractor either then or at a later date.

*In re LHF Wool Ltd*⁷ the English Court of Appeal pointed out that the modern practice was that where a company had a genuine and substantial cross-claim against the petitioning creditor which it had not reasonably been able to litigate the petition should usually be dismissed or stayed. The Court of Appeal had followed the opinion expressed in *re Portman Provincial Cinemas Ltd*⁸ where Lord Denning stated the law thus:

As I understand the law on the matter, it is this: if there is a genuine cross-claim with substance in it, then let it be tried out in the Queen's Bench Division; this petition must be rejected. But if there is no substance in the cross-claim, then let the court do justice to the petitioners in this case and not give heed to so insubstantial a cross-claim.

It was pointed out that by cl 7 of the lump sum agreement the parties had agreed that each of them waive antecedent breaches. But against that is the strong argument that you

A can only waive what is known - see *Datuk TP Murugasu v Wong Hung Nung*⁹ at p 292. Encik Gill refers to *Re Mittagong RSL Club Ltd*¹⁰ which reiterates that a substantial claim in the nature of a cross-claim or set-off would be sufficient to defeat a petitioner's right to a winding up order but which emphasizes that it should be a genuine cross-claim. A cross-claim has been filed. Affidavits have been filed to attempt to demonstrate that the cross-claims are genuine. I have not found anything to suggest that they are frivolous. I cannot on such information that is before me brush aside the cross-claim as being not genuine or insubstantial. It is not for this court at this stage to try the cross-claim. Following the dicta of Lord Denning MR, Lian Seng's cross-claim has to be tried in the court where it has been filed at the appropriate time. Until then KSY will have to wait before it can petition to wind up Lian Seng.

D Encik Gill referred me to *The Fedora*.¹¹ There were cross-claims there. Evans J in the court below held that the cross-claims:

asserted by the defendants were arguable and that the defendants could proceed with them by way of counterclaim; by reason of the provisions of the loan agreements and the guarantees the claims were not available by way of set-off or as a ground for giving unconditional leave to defend; the bank were entitled to summary judgment but the defendants would be granted stays of execution.

The defendants appealed contending that the learned judge had erred and that they should be given unconditional leave to defend. The plaintiff bank cross-appealed contending that the stays of execution should be removed.

F The Court of Appeal allowed the appeal stating that this court ought not to interfere since the parties, as the head-note puts it:

G had specifically provided both in the loan agreements and the guarantees that payment should be made free of any set-off or counterclaim; it would defeat the whole purpose of the transaction, would be out of touch with business realities and would keep the bank waiting for a payment which both the borrowers and the guarantors intended it should have while protracted proceedings in the alleged counterclaims were litigated; although the court had a discretion to grant a stay such discretion should rarely if ever be exercised; there was no ground for granting a stay and the bank's appeal would be allowed.

H It is to be noted that a stay of execution could be granted but which discretion is rarely, if ever, exercised.

I However, in the instant case we are not dealing with a stay of execution but considering whether a creditor against whom the debtor claims to have a genuine substantial cross-claim should be allowed to petition the court to wind up the debtor before the cross-claim has been determined. Following *In re LHF Wool Ltd*⁷ and *In re Portman Provincial Cinemas Ltd*⁸ if the cross-claim is substantial and genuine on the face of it the petition would

either be dismissed or stayed (pending disposal of the cross-claim).

Accordingly as the two judgments on which KSY initially founded its right to be a supporting creditor have turned out to be not a sound basis and as the right to the agreed lump sum had not crystallized prior to the date of presentation of the petition herein and in any event as the debtor has a substantial cross-claim against KSY in my judgment KSY cannot be recognized in this petition as a supporting creditor. There will be an order in terms of the motion encl (72).

Order accordingly.

Solicitors: *Allen & Gledhill; Murthi & Partners; EU & Tang; Shearn Delamore & Co; Mah Weng Kwai & Associates.*

Reported by *Wong Kim Fatt*

UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors

HIGH COURT (KUCHING) - CIVIL SUIT NO KG 412 OF 1986
HAIDAR J
20 MAY 1989

Civil Law Act - Assignment - Right to commence action only when complied with provision of the statute - Statement of claim failed to plead facts to bring case within statute relied on - Whether supplemental affidavit could remedy failure - Civil Law Act (Rev 1972), s 4(3)

Civil Procedure - Pleadings - Statement of claim failed to plead facts to bring case within statute relied on - Whether supplemental affidavit could remedy failure

Civil Procedure - Summary judgment - Form not strictly in compliance - Whether omissions or defects prejudicial - Technical errors - Delay in making application for summary judgment - Whether delay was inordinate

Civil Procedure - Further arguments - Whether new grounds can be raised - Rules of the High Court, O 56 r 2(2)

The plaintiffs' claim was in respect of a guarantee executed by the second defendant who was the director of the first defendant company. The first defendant company had entered into nine hire-purchase agreements in respect of bulldozers and the plaintiffs recommended and introduced the first defendant company to Mayban Finance Bhd ('MFB') for financing. MFB agreed to purchase the bulldozers and then hired them to the first defendant company. The second and third defendants entered into a guarantee of the hire-purchase.

By a dealer's master agreement between MFB and the plaintiffs, the plaintiffs agreed to indemnify MFB for all losses

suffered as a result of any agreement entered into between MFB and third parties in respect of any equipment sold by the plaintiffs and financed by MFB. The first defendant defaulted and the bulldozers were repossessed and sold. MFB demanded payment from the plaintiffs in accordance with the dealer's master agreement. The plaintiffs paid \$970,048.17 to MFB and MFB assigned to the plaintiffs all its rights, title and interest in the hire-purchase agreements and the guarantee.

The plaintiffs obtained judgment in default of appearance against the first and third defendants and applied for summary judgment against the second defendant. The application was allowed but the second defendant's counsel applied under O 56 r 2(1) for further arguments. The second defendant raised several arguments and contended that the application ought to be struck out as (i) there was a failure to comply strictly with Form 62; (ii) the plaintiffs must depose that they verily believe that there was no defence to the action; (iii) that the application should be taken out promptly; (iv) the affidavits filed did not disclose the place of residence or occupation of deponents nor the grounds or source of information; (v) there was defective notice of demand; (vi) there was misrepresentation by the plaintiffs; (vii) the claim was based on the variation agreement and not the hire-purchase agreements; (viii) there was no notice of assignment given to the second defendant.

Held, granting the second defendant leave to defend:

(1) The plaintiffs did not plead in the statement of claim the notice of the assignment. In order to claim a right created by statute, every necessary fact must be alleged to bring the case within the statute. The supplemental affidavit deposing that the notice of assignment had been served on all the defendants cannot make good any defect or omission in the statement of claim.

(2) The second defendant had filed his defence on 20 December 1986 and summary judgment was applied for some ten months later. The application must be made after appearance has been entered and could be made either before or after the delivery of defence provided that where it was made after delivery of defence, the plaintiffs must explain the delay. If the explanation is not accepted, summary judgment cannot be signed. The plaintiffs had not made any explanation and ten months was inordinate delay.

(3) Failure to comply strictly with the form was not fatal so long as the form was substantially in compliance and the defendants were not in any way prejudiced. In any event, the defect was minor and purely technical and was only an irregularity.

(4) The purpose of further arguments is to give the judge an opportunity to reconsider the order he has made in the somewhat hurried circumstances of a hearing in chambers on a chambers day. If counsel are precluded from relying on grounds other than those advanced, then there is really no useful purpose of hearing the matter under O 56 r 2(2) and would be a sheer waste of the court's time. The further argument is not an appeal where the appellant will have to confine himself within the bounds of the petition filed unless leave of court is obtained.

I Cases referred to

- 1 *Shanghai Hall Ltd v Town House Hostel Ltd* [1967] 1 MLJ 223 (fold)
- 2 *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 (distd)
- 3 *Comfort v Betts* [1891] 1 QBD 740 (refd)
- 4 *United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 (fold)